

No. 90-6352

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1990

DIANE GRIFFIN,

Petitioner,
vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of
Appeals For The Seventh Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether The General Jury Verdict Of Guilty Against A Single Defendant Is Reversible Under A Dual Object Conspiracy Count In A Multi-Defendant Drug Prosecution Where A General Verdict Renders It Impossible To Say Whether The Defendant Was Convicted By The Jury Based On The Object Insupportable As A Matter Of Law Or On The Remaining "Supportable" Object.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming petitioner's conviction and sentence is reported at 913 F. 2d 337 (7th Cir. 1990) and is reproduced in the Joint Appendix at pages 54 to 118. The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division issued October 28, 1988, is reproduced in the Joint Appendix at pages 47 to 53.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit affirming the U.S. District Court was entered on September 7, 1990. The petition for a writ of certiorari was filed timely on November 27, 1990 and this Court granted Certiorari on February 19, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Defendant was convicted of violation of 18 U.S.C. Section 371. No issues are raised involving the statute itself.

CONSTITUTIONAL PROVISIONS

This case concerns the constitutionally secured right to due process of law under Amend. V, and the constitutionally secured right to a jury trial under Amend. VI.

Amend. V (1791).

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amend. VI (1791).

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of their State and District wherein the crime shall have been committed, which District shall have been previously ascertained by a law, and to be informed of the nature and cause of the accusation; to be confronted by the Witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of Counsel for his defense.

STATEMENT OF THE CASE

This is a criminal case. Defendant, Diane Griffin, was charged in one Count, Count 20, of a 23 Count indictment with conspiracy to defraud the United States by two objects under 18 U.S.C. Section 371. The first object was

to impede, impair, obstruct and defeat the lawful functions of the Department of the Treasury, in particular the Internal Revenue Service, in the ascertainment, computation, assessment and collection of the revenue: to wit, income taxes. The second object was to impede, impair, obstruct and defeat the lawful functions of the Department of Justice, in particular the Drug Enforcement Administration, in the ascertainment of forfeitable assets.

At the end of the government's case and at the end of the entire case, the government and the trial judge agreed that there was not sufficient evidence in the case that Griffin had knowledge of drug dealing activities by the co-defendants or any person. The trial court refused to modify the jury instructions submitted by the government so that the jury would only consider the Internal Revenue Service object of the dual object conspiracy charge or require the jury to specify of which one of the two objects the jury found that defendant Griffin had knowledge.

The jury found defendant guilty of the conspiracy in Count 20, but it is unknown whether the jury found that Griffin had knowledge of the Drug Enforcement Administration object or the Internal Revenue Service object. She moved for a new trial on the basis that error was made in failing to remove the D.E.A. object as a basis for conviction through use of proper jury instructions. That motion was denied. The trial court sentenced the defendant to five years probation on the condition that she complete six months of work release and five hundred hours of community service. It is from this conviction, sentence and the affirmance of the United States Court of Appeals for the Seventh Circuit that the defendant seeks

reversal. The Seventh Circuit found that where the one object in a multi-object conspiracy was unsupported by the evidence as opposed to being legally insufficient, the guilty verdict is valid as long as there is sufficient evidence on the other object even if it is not known which object of the conspiracy the jury found as the predicate for the conviction.

The Seventh Circuit found that when there is a dual object conspiracy count where the one object is not factually supportable but the other object is factually supportable and the jury returns a general verdict not specifying upon which ground or upon which object the jury found guilt, the conviction must not be set aside even if it is impossible to tell which object the jury selected; however, if the factually unsupported object had been instead a legally insufficient object, then the conviction must be set aside since it is impossible to tell whether the jury selected the legally insufficient object.

SUMMARY OF ARGUMENT

Diane Griffin was charged with one count in a multi-defendant, multi-count indictment of a major drug prosecution in the United States District Court for the Northern District of Illinois, Eastern Division. Diane Griffin was charged in that one count under 18 U.S.C. Section 371 with a conspiracy having two objects, i.e. to defraud the United States by impeding the Internal Revenue Service in the ascertainment of income taxes and to defraud the United States by impeding the Drug Enforcement Administration in the ascertainment of forfeitable assets.

With regard to the conspiracy to defraud the Drug Enforcement Administration, the government produced a substantial amount of evidence of Griffin's association with major drug dealers and her cohabitation with the alleged kingpin of the drug operation, Alex Beverly. With regard to the conspiracy to defraud the United States by impeding the Internal Revenue Service in the ascertainment of income taxes, the government produced in evidence that Beverly gave Griffin real and personal property that she placed in her name and reported as hers on her income tax returns.

The government admitted at the time of Griffin's Motion For Judgment Of Acquittal at the end of the government's case that the evidence produced insufficiently supported the conspiracy to defraud the United States by impeding the Drug Enforcement Administration in the ascertainment of forfeitable assets. The trial court accepted the government's admission that the evidence was insufficient to support the Drug Enforcement Administration object. The trial court denied Griffin's Motion For Severance. At the end of the case, the trial court denied Griffin's tendered, alternative instructions that would have either required the jury to specify the objects of the conspiracy upon which the jury was finding guilt, if any, or would have restricted the jury to consider only the remaining Internal Revenue Service object of the conspiracy. On the contrary, over Griffin's objection the trial court gave the two government instructions that presented the two objects of the conspiracy count in the alternative. The government's instructions allowed the

jury to choose either the Drug Enforcement Administration object or the Internal Revenue Service object to convict Griffin on the conspiracy count.

The jury returned a general verdict of guilty on the conspiracy count. But it is not known, and it shall never be known, if the jury found her guilty of conspiracy based on the Drug Enforcement Administration object alone.

The reasoning in *Yates v. United States*, 354 U.S. 298 (1957) and *Stromberg v. California*, 283 U.S. 359 (1931) prohibits general verdicts on multiple object conspiracies where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. The United States Court of Appeals for the Seventh Circuit affirmed the conviction of Griffin on the ground that the rule of *Yates* and *Stromberg* applies when one of the objects is insufficient as a matter of law but that the rule of *Yates* and *Stromberg* does not apply when one of the objects is insufficiently supported by the evidence. In essence, the Seventh Circuit stated that when an object is insufficiently supported by the evidence, it is not a matter of law. This position, however, is contrary to the well accepted proposition that when the evidence fails to meet a minimum standard of proof, the failure is a matter of law. The judge rules as a matter of law that the proof has failed and that the defendant shall not be convicted. *Galloway v. United States*, 319 U.S. 372 (1943). Moreover, a challenge to the sufficiency of the evidence supporting a conviction is a constitutional claim. *Jackson v. Virginia*, 443 U.S. 307 (1979); *In Re Winship*, 397 U.S. 358 (1970).

It seems certain that if the statute of limitations in the Drug Enforcement Administration object had run or if the Drug Enforcement Administration object had been unconstitutional or if the Drug Enforcement Administration object of the conspiracy count had failed to state an offense, the Seventh Circuit would have reversed based on the rule of *Yates* and *Stromberg*. However, because the Drug Enforcement Administration object of the conspiracy was insufficiently supported by the evidence, the Seventh Circuit refused to follow the *Yates* and *Stromberg* rule.

The Seventh Circuit has found it improper to have the possibility that a defendant be convicted on an object where constitutional law says that object is unconstitutional. The Seventh Circuit has found it improper to have the possibility that a defendant be convicted on an object where the law regarding the statute of limitations precludes conviction on the object. The Seventh Circuit has found it improper to have the possibility that a defendant be convicted on an object that does not state an offense. However, the Seventh Circuit has found it proper to have the possibility that the defendant be convicted where the law with regard to the sufficiency of the evidence says that defendant cannot be convicted. The difference that the Seventh Circuit has drawn between legally insufficient objects and objects insufficiently supported by evidence is the quintessential difference without a distinction.

Petitioner urges this Court to preserve the rule of *Yates* and *Stromberg* which requires that a general verdict on multi-object count be set aside in cases where a general verdict is supportable on one object, but not on

another, and it is impossible to tell which object the jury selected. Further, petitioner urges the Court to find that for these purposes there is no distinction between objects deemed unconstitutional, objects precluded by the statute of limitations, objects insufficient by their allegations to state an offense and objects insufficiently supported by the evidence. Petitioner urges this Court to reverse the judgment and to remand the cause for new trial.

ARGUMENT

(A). GRIFFIN WAS CHARGED IN A DUAL OBJECT CONSPIRACY WHERE ONE OF THE OBJECTS WAS INSUFFICIENTLY SUPPORTED BY EVIDENCE

Defendant Diane Griffin was charged in one Count, Count 20, of a 23 Count Indictment under 18 United States Code Section 371 with conspiracy to defraud the United States by impeding the Internal Revenue Service in the ascertainment of income taxes and secondly by impeding the Drug Enforcement Administration in the ascertainment of forfeitable assets. (J.A. 17-22) She was indicted with five defendants and required to be on trial with four of them. The overwhelming majority of the case and the most significant part of this multiple count, multiple defendant cause consisted of evidence of drug dealing. (R. 340 Tr. 169-672, 688-1114) The tax evasion issue was a relatively small one at the trial. The government indicted Griffin under a theory that she had knowledge of drug dealing, and the government attempted to prove up their allegation.

Every one of the other five co-defendants at trial in the case were charged in the indictment with substantive counts of drug dealing. The government brought in evidence to connect Griffin to the other defendants. The government emphasized the fact through its evidence that she was one of the girl friends of the alleged drug kingpin, Alex Beverly. (R. 340 Tr. 427, 428, 749, 751, 845, 2964, 2965, 2966) During this five to six week trial the government repeatedly brought in evidence that drug conversations were had in her bar and on her telephones both in the bar and in her apartment. During the long trial the government repeatedly brought out through evidence that numerous large drug deals were initiated in her bar and then consummated in her building next door to her bar. The government brought in evidence that she had conversations with the largest wholesale supplier of drugs in the case and took messages from him for Beverly. (R. 340 Tr. 736, 737, 779, 781, 810, 811, 820, 823, 838, 841, 842, 855. Also generally Tr. 688-1114)

The government lead the evidence up to the point where Griffin was going to be a party to drug conversations, and the government had every intention of presenting evidence that she was a party. In the government's proffer it states where the evidence was going to demonstrate that Griffin was party to a drug conversation. On page 12 of the proffer it states as follows:

On July 25, 1986, Johnnie Davis met with Willie Jordan at the new Somon's Lounge. At the bar, Davis had a conversation with Jordan and Diane Griffin, one of Beverly's girl friends. (Sic) Davis told Jordan that he wanted to talk business, and Jordan told him that he was currently out of brown, referring to brown heroin. Jordan

further told Davis that he was expecting a load of brown in the next few days. Jordan told Davis that he would do a deal with him as soon as the brown came in. Jordan further told Davis that he was 'up to his ass in white', referring to cocaine. (R. 180 p. 12)

However, the witness' testimony at trial failed to place Griffin in the conversation as the government had promised it would do. In the testimony before the jury Davis testified that he and Jordan moved down to the other end of the bar while he conversed with Jordan. No one else was a party to their conversation. (R. 340 Tr. 300) Despite adducing a substantial amount of testimonial evidence and introducing a substantial amount of physical evidence that Griffin personally knew the defendants who were dealing in drugs and evidence that the defendants and co-defendants frequented her lounge, met her on many days and, in fact, that one, Beverly, actually lived with her in her apartment, it was undeniable that the government's evidence both at the end of its case and at the end of the trial as a whole was insufficient as a matter of law to show that Griffin had knowledge of any drug dealing. (R. 340 Tr. 2615)

(B). THE GOVERNMENT ADMITTED THAT THE EVIDENCE WAS INSUFFICIENT.

The government admitted at defendant's Motion For Judgment Of Acquittal at the end of the government's case that the evidence was insufficient as a matter of law that defendant had knowledge of the Drug Enforcement Administration object of the conspiracy. (R. 340 Tr. 2615) Consequently, the jury could not reasonably find

that Griffin had knowledge of that particular object of the conspiracy. The trial court agreed that the evidence was insufficient for a jury to convict Griffin based on the D.E.A. object. (J.A. 52)

Despite the fact that the trial court agreed after the government conceded the point that the evidence was insufficient to show knowledge of drug dealing, there was no indication that the jury realized what the lawyers and judge knew and/or agreed was a fact. The trial court denied Griffin's Motion For Severance after the government admitted that the record contained no evidence that Griffin had any knowledge of drug dealing. (R. 340 Tr. 3040, 3041)

This would have been an appropriate motion to grant since there was overwhelming prejudice caused to Griffin by requiring her to continue with the trial of the conspiracy to defraud the Internal Revenue Service with defendants charged with substantial drug distribution charges and against whom the government brought substantial evidence of drug distribution. There was a substantial possibility that the jury would unreasonably conclude that Griffin had knowledge of drug dealings because, as the Memorandum Opinion and Order of the District Court states, "Finally, Griffin has had a long standing intimate personal relationship with Beverly." (J.A. 51)

The only true alternative to a severance was to advise the jury affirmatively through a proper jury instruction that the jury could not consider the D.E.A. object of the conspiracy when it came to Ms. Griffin. The goal should have been to allow the jury only to deliberate on the I.R.S. object of the conspiracy. In lieu of that the use of a special

interrogatory to the jury to ask what object the jury was finding would have precluded the jury from finding Ms. Griffin guilty on the D.E.A. object.

(C). THE TRIAL COURT REFUSED DEFENDANT'S INSTRUCTIONS.

The trial court refused to give Defendant Griffin's Instruction 4A or 5A. (J.A. 39, 41) Not only did the trial court refuse to grant the severance, the court over defendant's objection accepted Government's Instructions Number 20 and 21. (R. 340 Tr. 3254 J.A. 31, 32) These instructions allowed the jury to find the defendant guilty under an erroneous view of the law because the instruction contained an erroneous statement of the law. The Government's Instruction Number 20 stated: "In Count 20 of the indictment, defendants Alex Beverly, Betty McNulty and Diane Griffin are charged with conspiracy to impede the lawful functions of the Internal Revenue Service and the Drug Enforcement Administration: Title 18 U.S.C. 371 provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be guilty of crime"

This instruction contains the disjunctive language *the United States, or any agency thereof*. The jury knew that the D.E.A. was a separate agency from the I.R.S. Under this

erroneous advisement, the jury only had to find a conspiracy against any one agency of the United States, i.e. either the D.E.A. or the I.R.S.

Government Instruction Number 21 stated: "The government must prove beyond a reasonable doubt, from the defendant's own acts and statements, that he or she was aware of the common purpose and was a willing participant." These instructions together allowed the jury to believe that there were two common purposes available for their consideration in finding the defendant Griffin guilty, i.e. to impede the I.R.S. and to impede the D.E.A., either of which was sufficient to convict.

These two instructions allowed the jury to have the erroneous view of the law that it was possible for them to find that Diane Griffin was aware of the common purpose of the conspiracy to impede the lawful functions of the Drug Enforcement Administration where, in fact, it was legal error for the jury to find that she had knowledge of the D.E.A. objective. These two instructions allowed the jury to believe that a conspiracy against either of the two agencies was sufficient to convict. The D.E.A. is "any agency" of the United States. This was the equivalent of the "one is enough rule" that many Circuits, including the Seventh Circuit, have said requires a specification of which object the jury is finding.¹ The trial court allowed

¹ The Seventh Circuit ventured that where a trial court instructs a jury that if the jury finds defendant guilty of only one of the objects in a multiple object conspiracy the jury may convict on the count and where one of the objects was insufficiently supported by evidence, the conviction may be reversible. *United States v. Beverly*, 913 F. 2d 337, 364 & n. 39 (7th Cir. 1990).

the jury to take an erroneous view of the law. The trial court did not do anything to eliminate the possibility that the jury would take an erroneous view of the law.

The indictment went back with the jury when the indictment allowed the jury to consider either of the two objects at the time that the jury decided whether or not to find the defendant Griffin guilty.

In order to attempt to preclude the possibility that the jury would find Griffin guilty based on her having knowledge of the drug dealings surrounding her, i.e. the D.E.A. object of the dual objective conspiracy charge, Griffin objected to Government Instruction Number 21 because it did not differentiate between the two objects of the conspiracy nor did it eliminate the D.E.A. object of the conspiracy from the jury's consideration or possible finding.

In lieu of the misleading Government's Instruction Number 21, defendant submitted Defendant Griffin's Instruction Number 1A in combination with Defendant Griffin's Special Interrogatory Number 1 and Defendant Griffin's Special Interrogatory Number 2. (J.A. 34, 35, 36, 37, 38) Defendant Griffin's Instruction Number 1A would have required the finder of fact, the jury, to find what is necessary, i.e. that defendant had knowledge of one of the objects of the conspiracy. Defendant Griffin's Special Interrogatory Number 1 and Defendant Griffin's Special Interrogatory Number 2 would have permitted the jury to specify which object of the conspiracy the jury was finding that Diane Griffin had knowledge of, if either. (R. 340 Tr. 3155, 3156)

The government objected to the special interrogatories 1 and 2. The stated reason for the government's objection to the interrogatories was ". . . in order to find the defendant guilty they have to find the elements. There's no basis for the special interrogatories and we object." The second stated objection was as follows, "Judge, I don't think it's necessary to submit it up, and I don't think it's any basis for the special interrogatory. The charge is clear what they have to find. The elements are clear. To divide it up by saying choose, I don't think it's appropriate and I don't think it's necessary." (R. 340 Tr. 3145 and 3146)

The Court refused to give Defendant Griffin's Instruction Number 1A and/or Defendant Griffin's Special Interrogatory Number 1 or Defendant Griffin's Special Interrogatory Number 2.

Knowledge of the object of the conspiracy is an essential element of any conspiracy conviction. *Ingram v. United States*, 360 U.S. 672 (1959). Without the knowledge intent cannot exist. *Direct Sales Co. v. United States*, 319 U.S. 703 (1943). It is fundamental that a conviction for conspiracy under 18 U.S.C., Section 371, cannot be sustained unless there is proof of an agreement to commit an offense against the United States. *Pereira v. United States*, 347 U.S. 1, 12 (1954).

In shorthand terms the objects were the D.E.A. object and the I.R.S. object. The government agreed that there was no evidence that defendant had knowledge of the D.E.A. object of the conspiracy. It follows then that the jury had specifically to find that defendant Griffin had knowledge of the I.R.S. object; yet, the Government

Instruction Number 21 did not differentiate between the two objects of the conspiracy; rather, it tendered the D.E.A. object of the conspiracy to the jury for finding. The trial court ruled that knowledge of the object of the unlawful purpose of the conspiracy was not an element of the offense. (R. 340 Tr. 3254)

As an alternative to Defendant's Instruction Number 1A with Defendant Griffin's Special Interrogatories Number 1 and Number 2, the defendant submitted Defendant Griffin's Instruction Number 4A so that the jury would have been required to find as an element of the offense, as required by case law, that the defendant knew that the object of the conspiracy was to defraud the Department of Treasury, in particular the Internal Revenue Service. (J.A. 39) This was the only possible remaining object of the conspiracy that the jury could have found under the evidence in the case and under the government's prior concession that there was insufficient evidence in the case that defendant had knowledge of the object of the conspiracy to defraud the D.E.A.

As an alternative to Defendant Griffin's Instruction Number 4A, the defendant submitted Defendant Griffin's Instruction Number 5A which required that the finder of facts, the jury, find that the government proved beyond a reasonable doubt that the defendant was aware that the common purpose of the conspiracy was to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of Treasury, in particular the Internal Revenue Service. (J.A. 41 R. 340 Tr. 3155, 3156) This instruction would have eliminated the possibility that the jury unreasonably and unlawfully found the other object of the conspiracy, i.e.

the D.E.A. object. If the jury found defendant guilty on the basis of the D.E.A. object, the jury found her guilty based on an erroneous view of the law since there was insufficient evidence as a matter of law to find her guilty based on knowledge of the D.E.A. object.

(D). THE GOVERNMENT ARGUED THE D.E.A. OBJECT IN CLOSING.

Despite the government concession that the D.E.A. object was insufficiently proved, when the government gave closing argument, the government advised the jury that Count 20 was a conspiracy to hide assets from the D.E.A. and the I.R.S. In particular the prosecutor said:

"There are, first of all, two conspiracy counts. Count 1 is a drug conspiracy, and it names the defendants Beverly, Brown, McNulty and McCorkle in a drug conspiracy. Count 20 is also a conspiracy, but that's a conspiracy to hide assets from the D.E.A. and the I.R.S. and again the defendant Beverly is named in that conspiracy count along with his girlfriends, Betty McNulty and Diane Griffin. In addition to those two conspiracy counts there are eighteen specific drug counts, those counts charge various defendants with the drug transactions that you heard about, the drug transactions that they participated in." (R. 340 Tr. 3295-3296)

In fact, in Count 20 the first seventeen paragraphs of Count 1, the drug conspiracy, are incorporated into Count 20 as are paragraphs 1 and 2 of Count 23, the drug based Continuing Criminal Enterprise Count. (J.A. 2-7, 17, 25 and 26)

When the government gave closing argument with regard to Count 20 specifically, the government did not differentiate between the knowledge of Griffin and the knowledge of Beverly and McNulty. Counsel for defendant Griffin objected to the argument but it was overruled. The government told the jury:

"Now, Count 20 is the second conspiracy. Count 20 doesn't allege a drug conspiracy. It alleges a conspiracy to evade the I.R.S. and to evade the D.E.A. Conspiracy to impede the lawful functions of those agencies. As to this count the government must show that the alleged conspiracy existed; that the defendants Beverly, McNulty and Griffin knowingly and intentionally became members of the conspiracy, and that an overt act was committed in furtherance of the conspiracy. Count 20 charges that those -

Mr. Logan: Judge, I have an objection for the record, as to what it must show. I object to that.

The Court: Alright. Overruled." (R. 340 Tr. 3353, 3354)

Even after all the discussion and eventual agreement that Ms. Griffin had no knowledge of drug trafficking, the government in rebuttal argument still attempted to argue to the jury that Ms. Griffin saw that members of Beverly's organization were dealing cocaine. The prosecutor in argument made direct reference to the previously referred to proffered factual situation in which the pre-trial proffer indicated that Diane Griffin was privy to a drug conversation even though the testimonial evidence later disclosed that she was not privy to it. The prosecutor argued to the jury:

Peter Suarez was a cocaine dealer. And you know that Mr. Beverly and the members of his organization were dealing cocaine. How do you know that? Because what was it that Diane Griffin saw? How do you know that? - Because remember when Jim Dandy said to - in '86 when Mr. Suarez was making deliveries to Mr. Beverly? Remember what Jim Dandy said to Officer Milton when Officer Milton was trying to buy heroin? Jim Dandy said, "I don't have any heroin but I have plenty of white." (R. 340 Tr. 3554)

Counsel for Griffin objected to the government's rhetorical question. (R. 340 Tr. 3571) The question implied that Ms. Griffin saw drug trafficking. This was exactly the reason that the proper jury instructions were required. Defense counsel demanded that the jury be told that there was no evidence. Although the government assured the Court that it would cover it, the government only said that Griffin saw no cocaine.

I misspoke earlier with respect to Diane Griffin, and that is that I said that there is evidence that she saw cocaine, and there's none. And we're not arguing that. Diane Griffin is charged in this case with assisting, knowingly assisting Alex Beverly in hiding his assets from the Internal Revenue Service. It's that simple. And we believe that the evidence has shown that that's what she did. (R. 340 Tr. 3571)

The evidence in the case showed that the Beverly organization was dealing both heroin and cocaine. This statement did not eliminate the heroin aspect. It did not eliminate the possibility that the jury would find that Griffin had knowledge of Beverly's drug dealing. Proper jury instructions were required.

The prosecutor's statement did not override the fact that Griffin prejudicially remained charged in the unredacted indictment with both objects of the conspiracy, that the government evidence showed that Ms. Griffin knew all the major drug players in the case and in fact lived with the kingpin, that the government in closing argument told the jury that she was charged with both objects of the conspiracy, that the jury instructions did not eliminate the very real possibility that the jury would only deliberate upon and find with regard to the D.E.A. object of the conspiracy and that trial court refused to advise the jury that the jury must find as an element of the case that defendant Griffin had knowledge of the D.E.A. object of the conspiracy. The instructions in this case do not make it clear that the jury found on the I.R.S. object of the conspiracy.

(E). THE JURY RETURNED A GENERAL VERDICT.

The jury in the instant case found defendant guilty of the conspiracy count. But it is not known, and it shall never be known, if the jury found her guilty because they found she knew of both objects of the conspiracy or the Internal Revenue Service object alone, or whether the jury found defendant guilty because they unreasonably and impermissibly found that she had knowledge of the D.E.A. object alone. It is not known whether the jury even considered the Internal Revenue Service object. Fact questions or special verdicts have been recognized as a tool to minimize the risk of jury prejudice or bias against a defendant.

The special verdict is available in federal criminal cases. Special verdicts are regularly used in criminal cases where the jury must determine the amount of interest to identify for the property subject to forfeiture. Notes of Advisory Committee on Rules, *Fed. R. Crim. P.* 31(e). In a discussion of the RICO statute one commentator has advocated use of special verdicts above and beyond the requirements of Rule 31(e) of the Federal Rules of Criminal Procedure.²

In *United States v. Coonan*, 839 F. 2d 886, 889-91 (2d Cir. 1988) the trial court was concerned about the possibility of prejudicial spill over from certain defendants to others. The court believed that if jurors were allowed to deliberate on a general verdict, the prejudice would be difficult if not impossible to detect or control. The judge proposed a two tier set of special questions that would first require the jury to determine whether the government had proven the existence of a RICO enterprise and secondly to determine with respect to each individual defendant whether the government had established that defendant's membership in the enterprise. Lastly, the court would inquire of the jury whether each individual

² Ciupak, *RICO and The Predicate Offenses: An Analysis of Double Jeopardy and Verdict Consistency Problems*, 58 Notre Dame Law Review 382, 408 (1982). Ciupak recommends that the jury should be asked to return with its general verdict a special verdict indicating which counts comprised the pattern of racketeering activity. She notes that several courts have successfully used this approach, including *United States v. Rone*, 598 F. 2d 564 (9th Cir. 1979); *United States v. Huber*, 603 F. 2d 387 (2d Cir. 1979) and *United States v. Peacock*, 654 F. 2d 339 (5th Cir. 1981).

defendant committed specific acts related to the conspiracy.

A general jury verdict of guilty may leave a reviewing court uncertain as to which offense or offenses alleged in a multi-object conspiracy were actually found by a jury. Where a general verdict renders it impossible to say whether a defendant was convicted under an erroneous or valid view of the law, the verdict is reversible.

(F. PRIOR SUPREME COURT LAW ON GENERAL VERDICTS.

In *Yates v. United States*, 354 U.S. 298 (1957) several defendants were convicted under the Smith Act of conspiracy (1) to advocate violent overthrow of the government, and (2) to organize a society for the purpose of such advocacy. Finding the prosecution of the "organizing" object of the conspiracy was barred by limitations, the Supreme Court applied this rationale in reversing the conviction:

'We' have no way of knowing whether the overt act found by the jury was one which is believed to be in furtherance of the 'advocacy' rather than the 'organizing' objective of the alleged conspiracy . . . in these circumstances we think the proper rule to be applied is that which requires a verdict being set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. *Yates*, at 312.

In the instant case the "D.E.A." object of the alleged conspiracy was insupportable because of insufficient evidence as a matter of law. Both the government and the

trial court took the view that the "D.E.A." object was insupportable. (R. 340 Tr. 2615)

In *Yates* the organizing object of the conspiracy was found precluded by the statute of limitations only on appeal. The government contended that since the conspiracy charged embraced both "advocacy" of violent overthrow and "organizing" the Communist Party, and the jury was instructed that in order to convict it must find a conspiracy extending to both objects, there was harmless error there. The government's argument was that the jury must have found the defendant guilty of both objects and that since the advocacy of violent overthrow object was legally sufficient the conviction should stand. The Supreme Court responded:

The portions of the trial court's instructions relied on by the Government are not sufficiently clear or specific to warrant our drawing the inference that the jury understood it must find an agreement if any to both 'advocacy' and 'organizing' in order to convict. Further, in order to convict, the jury was required, as the court charged, to find an overt act which was 'knowingly done in furtherance of an object or purpose of the conspiracy charged in the indictment,' and we have no way of knowing whether the overt act found by the jury was one which it believed to be in furtherance of the 'advocacy' rather than the 'organizing' objective of the alleged conspiracy. The character of most of the overt acts alleged associates them as readily with 'organizing' as with 'advocacy.' *Yates*, at 311 and 312.

The Supreme Court noted that the trial court did no more with regard to instructing the jury on the charge than to charge the jury, in the language of the indictment

"that the conspiracy had two objects, namely, to advocate and teach forcible over throw and to organize a Communist Party as a vehicle for that purpose, and then instruct the jury that it must find that the 'conspiracy charged in the indictment' had been proved beyond a reasonable doubt." Obviously the Supreme Court was not satisfied that the jury would understand that it had to find both objects before it convicted the defendant. In the instant case Government Instructions 20 and 21 presented the objects, i.e. to impede the I.R.S. and to impede the D.E.A. in the disjunctive. The jury only needed to find one object for conviction. This case ought to be reversed as the United States Supreme Court reversed in *Yates*.

The Supreme Court found the rationale for *Yates* in *Stromberg v. California*, 283 U.S. 359 (1931). In *Stromberg* the jury returned a general verdict of guilty on a count which contained three clauses defining the crime. The jury was instructed that proof of any one of the three defined acts would be sufficient to convict. The Supreme Court declared:

It is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses . . . was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause . . . (t)he necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld. *Stromberg*, 283 U.S. at 368.

Government Instructions 20 and 21 allowed the jury to deliberate upon and find Ms. Griffin guilty of Count 20 based upon the D.E.A. object alone. The government and

the trial court agreed, and both knew prior to the jury being instructed that the D.E.A. object was invalid as a matter of law. It cannot be determined upon the record in this case that the defendant was not convicted under the invalid D.E.A. object. It is impossible to say under which object of the conspiracy allegation the conviction was obtained. Just as the United States Supreme Court could not uphold the conviction in *Stromberg*, the conviction of the defendant in the instant case cannot be upheld.

In *American Medical Association v. United States*, 317 U.S. 519, 531-33 (1943) the Court held that a general verdict of guilty may stand only if the indictment alleges a single conspiracy and the evidence establishes a single conspiracy; conversely, if there are multiple objects of a conspiracy, and the evidence is insufficient as to any one of those objects, then a general verdict may not stand. The evidence with respect to Ms. Griffin on the D.E.A. object was admittedly insufficient, the jury's general verdict should not be allowed to stand. In *Haupt v. United States*, 330 U.S. 631, 641 & n.1 (1947) the Court held that where several acts are pleaded in a single count, a guilty verdict may not stand if any one of the pleaded acts was "insufficiently proved". This reasoning admits of only one disposition of Ms. Griffin's case and that is reversal and remand.

In *Zant v. Stephens*, 462 U.S. 862, 881 (1983) the Supreme Court held "that a general verdict must be set aside if the jury was instructed that it could rely on any two or more independent grounds, and one of those grounds is insufficient, because the verdict may have also rested exclusively on the insufficient ground." The trial

court in the instant case presented the two objects to the jury in the disjunctive; consequently the general verdict must be set aside.

(G). THE OPINION OF THE DISTRICT COURT.

The trial court in its Memorandum Opinion and Order on this issue would not have contested the applicability of *Yates v. United States*, *Stromberg v. California* or *United States v. Head* if, in the court's determination, the trial court's instruction had contained an erroneous view or statement of the law. The trial court merely declared that the defendant had not contended that the trial court's instruction contained an erroneous statement of the law. (J.A. 53) The trial court's implication is that the instructions contained no erroneous statements of law. Neither the trial court's stated reason nor its implication is accurate. Ms. Griffin plainly declared that Government Instructions Number 21 and 22 were erroneous. (R. 340 Tr. 3155, 3156, 3254 R. 316) The trial court's instructions, i.e. Government Instructions 20 and 21, allowed the jury to have the erroneous view of the law that it was possible for the jury to find that Diane Griffin was aware of the common purpose of the conspiracy to impede the lawful functions of the Drug Enforcement Administration where, in fact, it was legal error for the jury to find that she had knowledge of the D.E.A. objective. These two instructions allowed the jury to believe that a conspiracy against either of the two agencies was sufficient to convict. The trial court did not specifically differentiate between objects insufficient as a matter of law and objects insufficiently supported by the evidence.

In essence the trial court relied on *Turner v. United States*, 396 U.S. 398, 420 (1970) for the following proposition: '(t)he general rule is that when a jury returns a guilty verdict or an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged'. (J.A. 52)

(H). THE OPINION OF THE SEVENTH CIRCUIT.

The United States Court of Appeals for the Seventh Circuit affirmed the conviction of Ms. Griffin on the grounds that there is a different rule for multiple object cases where one of them is insufficient as a matter of law and multiple object cases where one of them is insufficiently supported by the evidence. The Seventh Circuit said that the rule in *Yates v. United States*, 354 U.S. 298, 312 (1957) applied only where one of the objects of the multi-object conspiracy was unconstitutional or precluded by a statute of limitations or failed to state an offense, but that when one of the objects of the multi-object conspiracy was insufficiently supported by the evidence, the rule of *Turner v. United States*, *supra*, applied and under the *Turner* rule the verdict in a multiple object case would stand if the evidence was sufficient with respect to any one of the acts charged. *United States v. Beverly*, 913 F. 2d 337, 365 (7th Cir. 1990) (J.A. 117) Since the D.E.A. object of the conspiracy in the Griffin case, according to the Seventh Circuit, was insufficiently supported by the evidence as opposed to legally deficient, the *Yates* rule was inapplicable.

The Seventh Circuit noted that several Ninth Circuit cases had held 'that *Yates* does not apply to insufficiency of evidence claims'. *United States v. Beverly*, at p. 363 (J.A. 112) The Seventh Circuit made no reference to either *American Medical Association v. United States, supra*, or *Haupt v. United States, supra*.

Although it appears that the First, Fifth, Eighth, Ninth and Eleventh Circuits follow the rule that the Seventh Circuit applied in the instant case, in none of those Circuits is a reason articulated for distinguishing objects insufficient as a matter of law and objects insufficiently supported by evidence.³

(I). THE OPINIONS OF THE THIRD CIRCUIT.

The Circuit Court of Appeals for the Third Circuit does not differentiate between legally insufficient objects and objects insufficiently supported by evidence. In *United States v. Dansker*, 537 F. 2d 40, 51 (3d Cir. 1976) the court reversed a conviction where the evidence was insufficient to support conviction under one of the two objects. The court reviewed a conspiracy Count in which two separate briberies were the objects of a conspiracy.

³ See *United States v. Johnson*, 713 F. 2d 633, 645-646 & n.15 (11th Cir. 1983), cert. denied, 465 U.S. 1081 (1984); *United States v. Halbert*, 640 F. 2d 1000, 1008 (9th Cir. 1981); *United States v. Murray*, 621 F. 2d 1163, 1171 (1st Cir.) cert. denied, 449 U.S. 837 (1980); *United States v. Phillips*, 606 F. 2d 884, 886 n.1 (9th Cir. 1979), cert. denied, 444 U.S. 1024 (1980); *United States v. Wedelstedt*, 589 F. 2d 338, 341-342 (8th Cir. 1978), cert. denied, 442 U.S. 916 (1979); *United States v. James*, 528 F. 2d 999, 1014 (5th Cir.), cert. denied, 429 U.S. 959 (1976).

The court found that the evidence failed to support one of the briberies. The court reversed the conviction on the conspiracy Count since the general verdict may have rested solely on a finding that the defendant committed the bribery that was insufficiently supported by evidence.

In *United States v. Tarnopol*, 561 F. 2d 466 (3d Cir. 1977) the court relied upon *Dansker*. In *Tarnopol* the conspiracy count had three objects. The first object was to impede the functions of the Internal Revenue Service. The second object was to use the mails to defraud artists and writers, etc. The third object was to use the wires to defraud the same groups as in object two. The court found that the object of defrauding the Internal Revenue Service was insufficiently supported by the evidence. The court found that the other two objects had sufficient evidence to sustain a finding by a jury. The court held: "In this situation the verdict of guilty on Count 1 cannot stand if the indictment was insufficient in law and that any one of the three objects of the conspiracy did not constitute a crime or if the evidence was insufficient to sustain a finding by the jury that any one of these activities had been engaged in."

In *United States v. Brown*, 583 F. 2d 659 (3d Cir. 1978) the court followed the rule of *Dansker*. The court reversed the convictions under Counts 13 and 14 since it was impossible to determine upon which of the predicate Counts, 1, 5, 6, or 9, the jury relied upon and where the court had already determined that Counts 5 and 6 were not supported by the evidence. In *United States v. Riccobene*, 709 F. 2d 214 (3d Cir. 1983) the court restated the rule but found that there was sufficient evidence for the jury to find with regard to all four predicate acts.

Although the court repeated the rule in *United States v. Vastola*, 899 F. 2d 211, 288 (3d Cir. 1990) the court there did not reverse the conviction since the court could determine that the jury did not rely on the challenged predicate offense when reaching its verdict on the RICO charge. In *United States v. Ryan*, 828 F. 2d 1010 (3d Cir. 1987) the court cited the rule of *Dansker* to reverse Count 2 of an indictment which alleged three distinct false statements. The court found that one of the alleged false statements could not form the basis for a conviction. The court found ". . . because the verdict was a general verdict, it is impossible for us to know which factual theory formed the basis of the conviction." In *United States v. Zauber*, 857 F. 2d 137 (3d Cir. 1988) the court again repeated the rule. The court did not apply the rule because it was possible to determine that the jury did not rely on invalid predicate acts.

In *United States v. Head*, 641 F. 2d 174 (4th Cir. 1981) the defendant was charged with a conspiracy containing three objects. Two of the objects had substantial statute of limitation problems raised by the allegations of those object crimes. With regard to two of the three objects of the conspiracy, the indictment rested in large part on acts occurring beyond the statute of limitations. The Court held that defendant Head was entitled to an instruction requiring the jury to find that an overt act was committed within the limitations period before it could find him guilty. The Court held that the failure to give this *special instruction* (emphasis added) to the jury was fatal. The Court in *Head* held: "We simply have no way of knowing whether Head was convicted for an offense barred by limitations. We decline to engage in speculation of this

sort in determining guilt in a criminal case." See *Head* at p. 179.

In the instant case Griffin was entitled to a special instruction requiring the jury to find of which object of the conspiracy Griffin had knowledge when the jury found her guilty of conspiracy. The failure to give the special instruction requested by defendant Griffin to the jury was fatal. There is no way of knowing whether defendant Griffin was convicted for an offense barred on the grounds of legally insufficient evidence. This Court ought to decline to engage in speculation of this sort in determining the guilt of Griffin in this criminal case.

The United States Court of Appeals for the Second Circuit recently has held in accordance with the rule in the Third Circuit. In *United States v. Garcia*, 907 F. 2d 380 (2d Cir. 1990) the court reviewed a conspiracy charge which alleged two objects, i.e. extortion by wrongful use of fear and extortion under color of official right. In *Garcia* neither the government nor the defendant requested that special interrogatories be given to the jury in order to learn the actual basis for the decision. The defendant, however, did make a motion for dismissal on the extortion by wrongful use of fear. On review the Second Circuit found that the evidence did not support extortion by the wrongful use of fear; consequently, the court stated: "Since the jury was not given special interrogatories we cannot determine on the record the precise basis for the guilty verdicts. Therefore, for our purposes, we must assume the jury could have found the Garcias guilty of extortion under either theory presented by the

government. Consequently, if there was insufficient evidence for one of the theories, then the verdict is ambiguous and a new trial must be granted."

The Second Circuit in *Garcia* cited *United States v. Natelli*, 527 F. 2d 311 (2d Cir. 1975) as precedent for the reversal. In *Natelli* the court found that there was insufficient evidence to find one of the defendants culpable on the "earning statement" specification on a multiple specification charge. The court found that the verdict became ambiguous for the jury could have rejected the specification which the appellate court held sufficient and could have convicted only on the specification held to be insufficiently proved. In that situation, the court said, there seemed to be no alternative but to remand for a new trial. As authority the court cited *Yates v. United States* and *Stromberg v. California*.

There have been contrary findings in the Second Circuit. In *United States v. Papadakis*, 510 F. 2d 287 (2d Cir. 1975) the court followed the contrary line of precedent and held: "Where a conspiracy has multiple objectives, a conviction will be upheld so long as evidence is sufficient to show that an appellant agreed to accomplish at least one of the criminal objectives."

(J). THE SEVENTH CIRCUIT HAS CONTRADICTORY OPINIONS.

Interestingly there have been findings by the Seventh Circuit contrary to its finding in the instant case. In *United States v. Berardi*, 675 F. 2d 894 (7th Cir. 1982) the Seventh Circuit held that in order to sustain a conviction on a count charging multiple acts, it must be shown that

"there is sufficient evidence to support the charge as to each of the acts alleged". *Berardi* at 902.

However, ten years before *Berardi* the Seventh Circuit in *United States v. Tanner*, 471 F. 2d 128 (7th Cir. 1972) upheld a conspiracy conviction in a multiple objective conspiracy count even though a "one is enough" instruction was given and on appeal the Seventh Circuit had held that one of the objects of the conspiracy failed to state a federal crime. The Seventh Circuit reasoned that a reviewing court should uphold a multiple object conspiracy conviction so long as any one of the alleged objects is unchallenged. In *Tanner* the Seventh Circuit held that the bombing of a ship was not a federal crime because the ship was not within waters that would confer jurisdiction upon the federal government.

But one year after *Tanner* the Seventh Circuit in *United States v. Baranski*, 484 F. 2d 556, 560-61 (7th Cir. 1973) found that one of the object offenses in the triple object conspiracy was unconstitutional and proceeded to reverse the conviction on the conspiracy count, declining to speculate whether the conviction rested upon a permissible or impermissible ground. In *Baranski* the Seventh Circuit found that the object was based on a statute that was unconstitutional on its face for failure to give potential law enforcement officials adequate guidance with respect to conduct privileged by the First Amendment. *Baranski* at 569. The Seventh Circuit has reversed a civil general verdict where the verdict in favor of the claimant was based on a trial judge's erroneous instruction which authorized the jury to award damages on an improper basis as well as a proper basis, but 'because the jury did not return their special verdict, we will never know if it

did so (on the improper basis)'. *Needham v. White Laboratories*, 847 F. 2d 355, 364 (7th Cir. 1988).

(K). THE SEVENTH CIRCUIT HAS DRAWN A DIFFERENCE WITHOUT A DISTINCTION

It seems certain that if the statute of limitations in the instant case had run on the D.E.A. object of the conspiracy or if the D.E.A. object was unconstitutional, the Seventh Circuit would have reversed on the basis of the *Yates* rationale. Why did the Supreme Court in *Yates*, *Stromberg*, *American Medical Association*, *Haupt* and *Zant* have a concern that a jury not be allowed the possibility of returning a general verdict of guilty on several objects when one of the objects was insufficient – whether in law or insufficiently supported by evidence, which in actuality is also a matter of law? The obvious answer is that the Court did not want the jury to convict the defendant on an offense for which the defendant under the law could not be convicted. This seems to be a very basic Due Process concern.

One commentator who has reviewed general verdicts in criminal cases has not distinguished between alternative objects defective because not supported by evidence and objects defective because of so called legal deficiency.

A defective alternative may be discovered only after the jury has been dismissed. This can happen when one of the alternatives is not supported by the evidence. It can also happen if one of the alternatives is defective in some other way. One alternative state of mind can be erroneously submitted to the jury, because the defendant had admitted a culpable state of mind higher than that alternative. One alternative

may be an unconstitutional presumption supporting an inference of fact. One of the objective substantive offenses of a conspiracy conviction may be held unconstitutional. The statute of limitations may bar one alternative. In all these situations, one alternative is defective. Lauer, *Jury Agreement And The General Verdict In Criminal Cases*, 19 Land and Water Law Review 207, 218 (1984)

In her 1984 Comment, Lauer stressed several solutions, including special verdicts, jury instructions which would require jury agreement on at least one alternative and withdrawing some alternatives from jury consideration. Lauer concludes, "The courts must recognize that where one alternative is defective and special verdicts have not been used, a new trial is essential". *Id.* at p. 223.

The only remaining question is why the Seventh Circuit and other Circuits in accord with the Seventh Circuit share the Supreme Court's concern when one of the objects is constitutionally deficient or precluded by a statute of limitations or does not state an offense but these Circuits have no concern when the evidence supporting the object fails to meet a minimum legal standard of proof.

(L). FAILURE OF EVIDENCE TO MEET A MINIMUM STANDARD IS A MATTER OF LAW.

First of all, when evidence fails to meet a minimum standard of proof in court, that is a legal insufficiency.

The judge rules as a matter of law that the proof has failed and that the defendant shall not be convicted.⁴

Recently a judge of the Circuit Court of Appeals for the Seventh Circuit in a majority opinion has agreed that insufficiency of evidence is a legal insufficiency just as unconstitutionality or preclusion by the statute of limitations. Judge Flaum stated, "On the other hand, a ground supported by insufficient evidence is legally deficient. Indeed, it is probably more so than, for example, one that is deficient only because barred by the statute of limitations." *United States v. Townsend*, appeal from the United States District Court for the Northern District of Illinois, Eastern Division, slip opinion number 88-3271, p. 57, decided February 14, 1991. Yet, despite Judge Flaum's agreement that insufficiency of evidence is as much a legal insufficiency as unconstitutionality or preclusion of the statute of limitations, he concluded that an object not supported by sufficient evidence in a multi-object conspiracy should not be reversed but that an unconstitutional object should cause reversal. *United States v. Townsend, supra*, at p. 59.

⁴ Brodin, *Accuracy, Efficiency And Accountability In The Litigation Process – The Case For The Fact Verdict*, 59 University of Cincinnati Law Review 15, 33 (1990): "Moreover, procedural devices that circumvent the jury, such as summary judgment, directed verdict, and judgment notwithstanding the verdict, have passed constitutional muster on the reasoning that where no facts are genuinely in dispute, or where reasonable jurors could not find for the party moved against, a judge can decide the case as a matter of law. See, e.g. *Galloway v. United States*, 319 U.S. 372, 396 (upholding constitutionality of directed verdict); *Page v. Work*, 290 F. 2d 323, 334 (9th Cir. 1961) *cert. denied*, 368 U.S. 875 (upholding device of summary judgment)."

It is important to note, however, as pointed out by Professor Timothy P. O'Neill of the John Marshall Law School, ". . . that a challenge to the sufficiency of the evidence supporting a conviction . . . is itself a constitutional claim. The United States Supreme Court has clearly held that the Due Process Clause of the Fourteenth Amendment requires that sufficient evidence be presented to convince a trier of fact of the existence of every element of an offense beyond a reasonable doubt".⁵ Professor O'Neill advises that it was the Seventh Circuit in *Cramer v. Fahner*, 683 F. 2d 1376, 1379-80 (7th Cir. 1982), *cert. denied*, 459 U.S. 1016 (1982) that held that the *Stromberg* rule is constitutionally based on the Due Process Clause and that the Seventh Circuit used the *Stromberg* rule to reverse an Illinois conviction by granting a *habeas corpus* petition. "The Seventh Circuit also specifically rejected the argument that *Stromberg* applied only when a count is invalid for constitutional reasons".⁶

One must follow the logic of the Seventh Circuit in *Beverly* concerning the difference it finds between objects insufficiently supported by evidence and so called legally insufficient objects. The Seventh Circuit has found it improper to have the possibility that a defendant be convicted on an object where constitutional law says that object is unconstitutional. The court has found it improper to have the possibility that a defendant be

⁵ O'Neill, *Unhappy Birthday: Illinois' 'One Good Count' Rule is 160 and Unconstitutional*, 76 Illinois Bar Journal 604 (1988). Professor O'Neill cites *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979); *In Re Winship*, 397 U.S. 358, 361-63 (1970).

⁶ *Ibid.* at p. 605.

convicted on an object where the law regarding the statute of limitations precludes conviction on the object. The court has found it improper to have the possibility that a defendant be convicted on an object that does not state an offense. However, the court finds it proper to have the possibility that the defendant be convicted where the law with regard to the sufficiency of the evidence says that the defendant can not be convicted.

Obviously if the concern expressed in *Yates* is to remain in the law, i.e. that the Court does not want the possibility that a defendant be wrongfully convicted on a general jury verdict in a multi-object conspiracy case, the difference that the Seventh Circuit and other Circuits have drawn between so called legally insufficient objects and objects insufficiently supported by evidence must be viewed as the quintessential difference without a distinction.

It is well known that juries do return verdicts of guilty on cases that do not meet the legal standard for sufficiency of the evidence. That is why the law provides motions for judgment notwithstanding the verdict, motions for directed verdict and motions for judgment of acquittal both at the end of the government's evidence and at the end of all of the evidence. Rule 29, *Federal Rules of Criminal Procedure*.

The jury in the instant case had no less an erroneous view of the law when the court submitted the D.E.A. object of the conspiracy count for the jury's consideration than when the trial court in *Yates* submitted the "organizing" object of the conspiracy count to the jury. In the instant case the remedy was simple and immediately at

hand. The trial court should have given one of the defendant's jury instructions to preclude the possibility of wrongful conviction. This case ought to be reversed and remanded.

CONCLUSION

Diane Griffin, as Petitioner respectfully urges that the decision below be reversed.

Additionally, Petitioner respectfully requests that this cause be remanded for new trial.

Respectfully submitted,

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